Filed 9/21/06 P. v. Keene CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRIAN SCOTT KEENE, Defendant and Appellant.	E037965 (Super.Ct.No. FMB 006024) OPINION

APPEAL from the Superior Court of San Bernardino County. James C. McGuire, Judge. Affirmed.

Tracy Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Adrianne S. Denault and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Brian Keene of first degree murder, during which he used a hatchet/hammer.(Pen. Code, §§ 187, subd. (a); 12022, subd. (b)(1).) He was sentenced to prison for 25 years to life, plus one year. He appeals, claiming the trial court erred in limiting the cross examination of a prosecution witness, admitting evidence of that witness's plea bargain, instructing the jury with CALJIC No. 2.28 and excluding evidence of the victim's propensity for violence. We reject his contentions and affirm.

FACTS

Keene, his daughter, her fiancé named Williams, and the couple's young son lived together. Keene and Williams also worked together occasionally at a local bar. In early April, 2003, the victim hired Keene and Williams to paint a home on his property in exchange for a used motor home. According to Keene, when he and Williams finished their work and he took possession of the motor home, it had things wrong with it that the victim had not disclosed to him beforehand. Keene met with the victim, who gave him $50 and agreed to pay him another $350 on May 3, when the latter received a check. On April 20, Keene testified, he went to the victim's home, in a car driven by Williams, to ask the victim to borrow the $350 from someone so he could be paid immediately. Keene said that he was not mad or upset and he was admitted into the victim's home after knocking. Keene made his proposal to the victim, who became angry and Keene told the victim that he would just have his father, who was a friend of the victim's, sue the victim. Announcing that he was going to put a "stop to this" the victim grabbed a gun from the bar in his living room and pointed it at Keene. As they struggled over the gun, Keene grabbed a hatchet from the bar and hit the victim on the head twice and once in the hand, which the victim had put up to protect his head. The victim tried to grab a butcher knife

from the bar and Keene hit him again on the side of the head. The victim backed up into his bathroom doorway and Keene thought he saw something in the victim's hand, so he grabbed a hammer from the bar and tackled the victim, pushing him into the bathroom shower. The victim got up and Keene hit him with the hammer. Keene took the victim's gun and left.

Keene's daughter testified that she had been told that her father and Williams went to the victim's home and were admitted by the latter to have beer together and when the victim turned around, they hit him on the head with a hatchet. The victim was hit again while he was on the floor of the bathroom. She was also told that it was not true that the victim pulled a gun on them.

Both Keene and his daughter testified that after the killing, Keene and Williams told her to tell the police that the victim had tried to rape her, they had gone to his house to beat him up, but he had pulled a gun on them and they killed him in self defense. Keene urged his daughter to practice testifying to this story at trial and from jail following his arrest he wrote her several letters, which were shown to the jury, further coaching her in this regard. Keene told a man who hired him after the murder that he killed a molester in the desert and "shanked him" but he never said he did so in self defense.

ISSUES AND DISCUSSION

1. *Trial Court Limitation on Defense Cross-Examination of Prosecution Witness*

In a pretrial motion, the prosecution sought to prohibit the defense from introducing a portion of one of the letters Keene had written to his daughter from jail in which he mentioned his fear that the prosecutor might have the daughter's son "taken by

local authorities" to force the daughter to lie about him. In her written motion, the prosecutor asserted that both of the daughter's children were then in the custody of Child Protective Services in Illinois and their status was "not due to any influence exerted by the [the prosecutor's o]ffice. The prosecutor's moving papers went on to assert that the daughter, who was incarcerated, had entered into a plea agreement to testify against Keene and Williams, which did not contemplate having the child in question taken by CPS nor returning him to his mother upon her release from custody in exchange for her testimony.

At the hearing on the motion, defense counsel agreed that the portion of the letter at issue was not admissible, but asserted that "this might be an issue of cross-examination when" the daughter testified. The prosecutor disagreed, saying she had had no involvement whatsoever with the daughter's children. Defense counsel countered, "I think the fact that [the daughter] is in custody . . . and . . . might have faced some kind of conspiracy to commit murder charge . . . is [relevant] to . . . what might cause her to testify in a particular way." The trial court told defense counsel it would not prohibit him from exploring whether the daughter "is . . . testifying and lying to get a plea bargain . . . . [¶] But to say that she is in custody, therefore, she can't have her children, therefore, that's her motivation [to testify], I don't see that." Defense counsel said the daughter could feel pressured "from a variety of sources" to embellish her testimony to please the prosecution. The trial court pointed out that Keene, himself, had acknowledged that the story the daughter had originally told, that the victim had raped her, wasn't true. The court informed defense counsel he could ask the daughter if she felt pressure to give statements favorable to the prosecution in order to ensure she regain

custody of her children. The court added that if asking this question "brings out anything that needs to be fleshed out, at that point I will allow it." However, the court was under the impression that defense counsel wanted to imply, by his questions, that the prosecutor had used the daughter's children to influence her testimony, without any proof that this actually had occurred. Defense counsel conceded he could not prove it, but, he added, even if he could not, if the daughter *merely thought* that the prosecutor had some power over her regaining custody of her children, he should be able to question her about her belief. The trial court said, "You can ask her, but it will be very limited." The court pointed out again that there was a plea bargain and the defendant "pretty well acknowledges everything [the daughter] said. [¶] . . . [¶] [O]bviously, defense counsel can go into issues that may be on . . . any witness's mind, that may color their testimony . . . [¶] . . . [but] unless you start getting some positive answers that there is something there, I am going to ask you to move on."

During direct examination, the daughter testified that she entered into a plea bargain in which she pled to being an accessory after the fact[1] and "if [she] cooperate[s] and tell[s] the truth, [she] can go home." A copy of her plea agreement was admitted as evidence. It required her to testify truthfully, whether her testimony helped her father and Williams or the prosecution. It further stated that it was not contingent on the successful prosecution of either man. It stated that the daughter was to receive, at minimum,

---

[1] Although the daughter's actual change of plea form stated only that she was pleading to being an accessory after the fact and after she testified that she pled to being such "to murder" the trial court "corrected" her testimony by pointing out the former to the jury, her change of plea form referenced a letter, included in Exhibit 85, which stated that she was pleading to being an "[a]ccessory after the fact *to murder*."

probation with credit for time served, and, at maximum, three years in prison for her crime. Finally, as pertains here, it stated that during the pendency of the cases involving her father and Williams, she "*will* remain in custody" and the agreement "will *not* serve as a promise nor be in exchange for an OR release . . . .

During cross examination of the daughter, defense counsel began a question as follows, "[Y]ou've been in custody since . . . " He was interrupted by the prosecutor's objection, which was sustained by the trial court. At side bar, defense counsel said, "[T]he fact that she's been in custody and released is something the jury needs to . . . know that goes to her credibility because if she would lie for her father, she might lie to get out of custody." The trial court pointed out that was not a term of her plea bargain which was correct. The court warned defense counsel that it would cite him for misconduct if he "went into that."

As soon as the daughter finished her testimony and was excused, the trial court held a presentencing hearing in the case involving the charge against her. Based on what the court said was "an agreement of the parties" it released the daughter on her written promise to appear at sentencing, instructing her to violate no law, not leave the jurisdiction without the court's permission and abide by the terms of the plea agreement.

The defendant here contends that the trial court violated his right to confront the daughter by preventing defense counsel from making the point that "[the daughter] was in custody . . . but had an agreement with the prosecution that she would be released from custody as soon as her testimony concluded." However, as stated before, the daughter testified on direct that "if [she] cooperate[d] and t[old] the truth, [she] could go home." Thus, the jury was not prohibited by the trial court's rulings from hearing this evidence.

While it is true that the trial court did not allow defense counsel to reiterate the point, it had been made all the same. Under the circumstances, the defendant cannot demonstrate that he was substantially prejudiced by the absence of reiteration of this by defense counsel.

2. *Admission of the Prosecution Witness's Plea Agreement*

As stated before, the daughter's plea bargain required her to "cooperate with law enforcement and testify truthfully at all required proceedings against" her father and Williams. One portion of the bargain provided, "The judge hearing the testimony will determine if [the daughter] has been truthful in her testimony and whether she has cooperated with law enforcement during the prosecution of [Keene and Williams] . . . . The judge's analysis of [the daughter's] cooperation and truthfulness will weigh heavily on any sentence recommendation by [the prosecutor's] office."

The defendant here asserts that the prosecutor committing misconduct in offering this portion of the bargain for admission and the trial court erred in admitting it, as it was inadmissible under *People v. Fauber* (1992) 2 Cal.4th 792, 823. He goes on to assert, "Although the jurors were told that they were to decide the credibility of each witness, the trial court's silence regarding [the daughter's] truthfulness implicitly told the jurors that the court found her testimony to be truthful." Finally, in his reply brief, he asserts, for the first time, the fall-back position that his trial attorney was incompetent for failing to object to admission of this provision.

In *Fauber*[2], the defendant contended that introduction of a witness's plea bargain prejudiced him because, through it, the prosecutor and trial judge vouched for the credibility of that witness. The agreement provided that the bargain was not effective unless and until the prosecutor decided that the witness was telling him the truth. The jury was told that the bargain was in effect at the time the witness testified, thus making it clear that the prosecutor had, indeed, determined that the witness was being truthful. The bargain further provided that the witness was to testify truthfully as a witness against the defendant and "[i]n the event of a dispute, the truthfulness of [the witness's] testimony will be determined by the trial judge[s] who presides over [the defendant's trial]." (*Id*. at p. 821, fn. 4) At the conclusion of the witness's testimony, if, in the opinion of the trial court, he had complied with the terms of the agreement, he would be allowed to plead to second degree murder and have the first degree murder and other charges against him dismissed. The California Supreme Court concluded that that portion of the plea agreement concerning the prosecutor determining whether the witness was credible constituted prohibited vouching for the witness. Nevertheless, the high court concluded its admission was harmless. There was no similar provision in the daughter's plea agreement.

Returning to *Fauber*, in response to the defendant's contention that the provision concerning the trial court determining the witness's credibility, the Supreme Court held, "Our decision in *People v. Phillips, supra*, 41 Cal.3d 29, requires full disclosure to the

---

[2] *Fauber* shares with this case the fact that defense counsel waived the matter by failing to object to introduction of this provision of the plea bargain below. Like the Supreme Court in *Fauber*, however, we side step this fatal flaw in Keene's position to address his contention on the merits.

jury of any agreement bearing on the witness's credibility, including the consequences to the witness of failure to testify truthfully. Full disclosure is not necessarily synonymous with verbatim recitation, however. Portions of an agreement irrelevant to the credibility determination or potentially misleading to the jury should, on timely and specific request, be excluded. Here, it was crucial that the jury learn what would happen to [the defendant] in the event he failed to testify truthfully in defendant's trial. But the precise mechanism whereby his truthfulness would be determined was not a matter for its concern. The provision detailing the judge's determination of [the defendant's] credibility in the event of any dispute arguably carried some slight potential for jury confusion, *in that it did not explicitly state what is implicit within it: that the need for such a determination would arise, if at all, in connection with [the defendant's] sentencing, not in the process of trying defendant's guilt or innocence.*"[3] (*People v. Fauber, supra*, 2 Cal.4th at p.823.) In contrast to *Fauber*, the daughter's plea agreement

---

[3] The *Fauber* court went on to hold, "Nonetheless, we see no possibility that defendant was prejudiced by its admission. The jury could not reasonably have understood [the defendant's] plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether [the defendant's] testimony was truthful. Nor could the jury have been misled by prosecutorial argument. The prosecutor argued that [the defendant] had nothing to gain by lying because the trial court would make a determination of his credibility in the event of a dispute. The context of the remarks made it clear that determination would occur if the prosecutor sought to repudiate its agreement with [the defendant] after trail in [his] case. [¶] Our conclusion is reinforced by the fact that the trial court instructed the jury, before the start of the prosecution's case and after closing argument, that '[e]very person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony . . . . [Fn. omitted)' (CALJIC No. 2.2.0.) We presume, in the absence of any contrary indication in the record, that the jury understood and followed this instruction." The jury here was also given CALJIC No. 2.20.

made clear that the trial court's determination of her credibility affected only the length of her sentence and not whether she would be allowed to plead guilty to being an accessory after the fact.[4] Thus, contrary to Keene's assertion, there is nothing in Fauber that requires reversal of his conviction.

Keene's assertion that the trial court's silence regarding the daughter's truthfulness impliedly told jurors that the trial court found her to be credible is absurd. The trial court made no comment whatsoever on her truthfulness - this trial was not the time or place for that (the daughter's sentencing hearing was) and the plea bargain made this clear.[5]

3. *CALJIC 2.28*

The prosecution introduced testimony by a blood splatter expert that was inconsistent with Keene's account of the crime. To rebut this testimony, the defense had its own blood splatter expert testify to some matters contradicting the prosecution's expert.

While the defense expert was testifying, she referred to photographs which she had taken herself and which had not been shown to the prosecution beforehand. Although the trial court initially allowed her to testify about three of them, because they were similar to other exhibits which had been mentioned by the prosecution's expert,

---

[4] Unlike in *Fauber*, this agreement did not have an "escape clause" whereby if the trial court determined that the witness was not being truthful, the latter would be allowed to withdraw her guilty plea and proceed to trial on the original charge.

[5] As with his prior argument, Keene waits until his reply brief to assert, for the first time, that his trial counsel was incompetent for failing to object below to the admission of this provision of the daughter's plea bargain. Our disposition of his argument on the merits eliminates any need for us to respond to this "late-breaking" contention.

ultimately, the trial court ruled that some were inadmissible and the defense did not ask that others be admitted.[6] The trial court admitted into evidence two diagrams prepared by the defense expert which had not been previously shown to the prosecution.[7] *As a sanction for the defenses' failure* to abide by the rules of discovery, the trial court gave the jury the following version of CALJIC No. 2.28**, "**The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Concealment of evidence and/or delay may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncomplying party's evidence. [¶] Disclosures of evidence is required to be made at least 30 days in advance of trial. Any new evidence disclosed within 30 days of trial must be closed immediately. [¶] In this case, the defendant concealed and/or failed to timely disclose the following evidence: Photographs taken by [the defense's expert] and Exhibit No. 120, [the defense expert's] diagram of the crime scene. [¶] Although the defendant's concealment and/or failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. The weight and significance of any concealment and/or delayed disclosure are matters for your conscious consideration. However, you should consider whether the concealed and or untimely disclosed evidence

---

[6] Because of this, the instruction at issue should not have referenced these photos.

[7] The disputed instruction made no reference to the first of these diagrams, but did to the second.

pertains to a fact of importance, something trivial or subject matters already established by other credible evidence."

In arguing that the giving of this instruction requires reversal, here Keene cites a number of cases in which the giving of 2.28 was assigned as error, with varying results, depending on its prejudicial impact. (*People v. Lawson* (2005) 131 Cal.App.4th 1242; *People v. Bell* (2004) 118 Cal.App.4th 249; *People v. Cabral* (2004) 121 Cal.App.4th 748; and *People v. Saucedo* (2004) 121 Cal.App.4th 937.) In *Lawson* and *Bell*, the appellate courts faulted 2.28 for either implying or failing to disabuse the jury of any assumption that the defendant, in contrast to his attorney, was responsible for the failure of discovery. However, this danger was not present here, as the jury witnessed the exchange between counsel, the trial court and the witness about defense counsel's failure to provide discovery to the prosecutor. Be that as it may, we assume for purposes of argument that 2.28 should not have been given here.

Keene is entirely incorrect in his analysis of the prejudicial impact of the instruction. He asserts that his expert's opinion supported his version of the crime, specifically in that he had attacked the victim in self defense, and contradicted the prosecution's expert, which supported his daughter's version that the victim was killed as part of a robbery. In so asserting, he reads into the daughter's testimony something that was not there. Although she testified that she had been told that the victim let Keene and Williams into his small house, and *when* the victim turned, he was hit in the head with a hatchet, she never testified *where* this occurred. The prosecution expert also did not testify that there was any blood at or near the door of the victim's home. The true significance of the defense expert's testimony was her conclusion that the victim had not

been hit in the bathroom once he was down on the ground, which contradicted the prosecution expert's opinion. This had nothing whatsoever to do with whether the killing was committed in self-defense rather than as part of a robbery. We agree with the People that in light of the almost overwhelming evidence of guilt, the giving of this instruction could not possibly have significantly harmed prejudiced Keene.

4. *Exclusion of Propensity Evidence*

Before trial began, Keene moved to be permitted to introduce evidence of the victim's propensity for violence to support his claim of self defense. During a hearing on the motion, defense counsel told the trial court that he had information that the victim's girlfriend said that the victim had been physically abusive to her and had broken her jaw. Counsel also said that Keene's father and a man who had testified at Williams' trial knew the victim to have a reputation for violence and were aware of specific acts of violence committed by the victim. Defense counsel agreed to provide the prosecutor with discovery as to these matters. The prosecutor told the trial court that of the two reports she had concerning the girlfriend, in neither did the latter mention a broken jaw. The prosecutor said in one, the girlfriend reported that the victim drank excessively on occasion, but was never violent. In the other, law enforcement had been called to the victim's house for an assault, but when they arrived, both the victim and the girlfriend were asleep. The girlfriend had a scratch on her arm and a bruise on her back, but the victim denied injuring her. Neither he nor the girlfriend could remember how she got injured. Both said the girlfriend took medications, which made her dizzy, and she fell a lot, and might have done so on this occasion. The prosecutor added that the girlfriend

currently had a brain tumor and "has told all sorts of tales[.]" The trial court ordered defense counsel to investigate this and request a 402 hearing before attempting to introduce her testimony. The prosecutor said that the man who had testified at Williams' trial said that he was at the victim's house drinking, the victim asked him to leave, he refused, the victim either pushed him by the shoulders or pulled him by his arm and the man hit the victim. The trial court, who had also presided at Williams' trial, acknowledged hearing this testimony at that earlier proceeding . The prosecutor told the trial court she had no report that Keene's father had observed any acts of violence by the victim. The trial court ordered defense counsel to provide reports as to these matters. Defense counsel said he had no such reports, but would make his investigator available to the prosecution.

Later, the prosecutor reported to the trial court the result of her investigator's interview of the defense investigator. The later said that the victim's girlfriend had reported that the victim was sometimes verbally abusive but had never physically injured her. He added that a month before the murder, the victim and his girlfriend had attended a community barbeque, during which a man talked to the girlfriend and he and the victim got into a fight over it. However, the defense investigator was unable to identify this man. Keene's father gave the defense investigator no information about violent acts by the victim. Defense counsel conceded that these witnesses may well testify that the victim exhibited no propensity for violence. The trial court denied Keene's motion, finding that the defense had violated its duty to disclose the information to the prosecution and under Evidence Code section 352, the probative value did not outweigh the prejudicial impact.

Wisely, Keene here does not contend that the trial court abused its discretion in denying his motion. Rather, he asserts that the ruling "prevented the defense from continuing to investigate and then presenting this critical evidence." This is absurd. The defense was not prevented from doing anything. It was free to continue to investigate and unearth any evidence which it could then have presented during a 402 hearing.

The victim's ex-wife testified, without objection from the defense, that he had suffered a stroke three and one half years before the murder, had had a "little, but not serious" heart problem, took a lot of medications and was slow physically. After Keene testified for the defense, his attorney moved again to have the trial court admit evidence that the victim had a propensity for violence in order to counteract this testimony about the victim's compromised physical state. This time, the offer of physical proof was the defendant's testimony about incidents he witnessed, during which the victim injured his girlfriend. The prosecutor told the trial court that the girlfriend had "gone back and forth" in her stories about what the victim had done to her, she currently had a brain tumor and was not a reliable witness. The prosecutor added that the defendant's testimony would constitute hearsay, in that he had not actually witnessed any incidents, but had merely been told about them by the girlfriend after the fact. Defense counsel did not contradict this. Given the defendant's own testimony about the nature of his relationship with the victim (he said they were only together occasionally when drinking and there was always a friendly crowd present) this seems entirely plausible. Certainly, defense counsel made no offer of proof as to specific acts his client may have witnessed. Given this, we cannot agree with the defendant that the trial court abused its discretion in not permitting him to testify as to the victim's propensity for violence. Even if the court did err, the fact that

the defendant had every reason to lie about this, the girlfriend was not available to cooborate his story and it would have contradicted Keene's own trial testimony about the circumstances under which he spent time with the victim, there is no possibility that it's admission would have resulted in a better outcome for the defendant.

DISPOSITION

The judgment is affirmed.

RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

McKINSTER
J.